



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Kyle Foust
Friends of Kyle Foust
4856 Daniels Street,
Erie, PA 16510

JAN 3 - 2008

RE: MUR 5925
Kyle Foust
Friends of Kyle Foust

Dear Mr. Foust:

On July 20, 2007, the Federal Election Commission notified you and Friends of Kyle Foust of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On December 27, 2007, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe that Friends of Kyle Foust violated the Act. Accordingly, the Commission closed its file in this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact William Powers, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to be "Julie K. McConnell", written over a horizontal line.

Julie K. McConnell
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Kyle Foust **MUR: 5925**
5 Foust for Congress (f/k/a Kyle Foust
6 Congressional Exploratory Committee)¹
7 and Randall Rinke, in his official capacity as treasurer
8 Friends of Kyle Foust
9

10 **I. GENERATION OF MATTER**

11 This matter was generated by a complaint filed with the Federal Election Commission by
12 the Erie County Republican Committee, alleging a violation of the Federal Election Campaign
13 Act of 1971, as amended ("the Act"), by Kyle Foust, Foust for Congress (f/k/a Kyle Foust
14 Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer,
15 ("Foust Committee"), and Friends of Kyle Foust, Foust's state political committee. *See* 2 U.S.C.
16 § 437g(a)(1).

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Testing the waters**

19 Kyle Foust is an Erie County councilman and a Democratic primary candidate in
20 Pennsylvania's 3rd Congressional District. Sometime before July 6, 2007 and prior to becoming
21 a federal candidate, Foust sent an undated letter seeking support for the Kyle Foust
22 Congressional Exploratory Committee. *See* Attachment 1 at 1. The stated purpose of the letter

¹ The complaint named and the Commission notified Kyle Foust Congressional Exploratory Committee as the respondent committee in this matter. According to the response, the respondent committee changed its name from Kyle Foust Congressional Exploratory Committee to Foust for Congress when it filed its statement of organization on July 23, 2007. Because Foust for Congress appears to be the same committee that was notified, this Report, unless otherwise specified, hereinafter will refer to the respondent committee as "Foust for Congress (f/k/a/ Kyle Foust Congressional Exploratory Committee) ('Foust Committee')."

1 was for Foust to “gauge the viability” of a federal candidacy. *See id.* This letter referred the
2 readers to Foust’s county council re-election website, www.kylewfoust.com, to learn more about
3 the candidate’s background and record as a public official. The complaint alleges that this
4 reference resulted in the use of non-federal funds for “testing the waters” activities in connection
5 with Foust’s federal candidacy.

6 In their response, Kyle Foust and the Foust Committee argue that the letter’s reference to
7 the website was not a contribution under the Act, citing to the *Campaign Guide for*
8 *Congressional Candidates and Committees*, which states that websites prepared by a volunteer
9 will not be considered a contribution. Response at 1. The response further states that “[t]he
10 same volunteer created a website for Kyle Foust federal and non-federal campaigns” and that
11 “nowhere on the nonfederal website is there any mention or reference to the Congressional
12 Exploratory Committee or the federal election.” *Id.*

13 Foust’s assertion that a volunteer hosted and maintained the website appears to be
14 corroborated by information available in the public domain. Around the time of the complaint,
15 the referenced website, www.kylewfoust.com, contained a disclaimer that the website was paid
16 for by the Friends of Kyle Foust, Foust’s state committee. *See* Attachment 2. This website has
17 since been changed and now contains a disclaimer that the website is “Paid for by Friends of
18 Kyle Foust” and “Web Design by Marni Alward.” *See* Attachment 3. In addition, the content of
19 the website has been removed, and it now redirects individuals to www.foustforcongress.com.
20 *Id.* The new website, www.foustforcongress.com, states that it is “Paid for by John & Marni
21 Alward” and “authorized by Foust for Congress.” *See* Attachment 4. Moreover, the Foust
22 Committee’s contention that the website was paid for by a volunteer, and not the Committee, is

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1 reflected in the Committee's October 2007 Quarterly Report by the absence of any Internet
2 related expenditures or payments made to John or Marni Alward.

3 Sections 100.72 and 100.131 of the Commission's regulations exclude from the
4 definition of contributions and expenditures funds received and payments made solely for the
5 purpose of determining whether an individual should become a candidate. However, if the
6 individual subsequently becomes a candidate, the funds received and payments made are
7 contributions and expenditures subject to the reporting requirements of the Act. *See* 11 C.F.R.
8 §§ 100.72 and 100.131. Because funds raised for purposes of "testing the waters" may later be
9 subject to federal restrictions and reporting requirements, "[o]nly funds permissible under the Act
10 may be used for such activities." *Id.*

11 Section 100.74 of the Commission's regulations, however, provides that the value of
12 services provided without compensation by any individual who volunteers on behalf of a
13 candidate or political committee is not a contribution. The regulations further exempt volunteer
14 Internet activity, when provided by an individual without compensation, from the definition of
15 "contribution." *See* 11 C.F.R. § 100.94. This exemption applies to both an individual's
16 uncompensated personal services related to Internet activities and his or her use of equipment or
17 services, including domain name services, for uncompensated Internet activities, regardless of
18 who owns the equipment and services. *See id.* Furthermore, "individuals may be reimbursed by
19 political committees for any out-of-pocket expenses they incur in performing Internet activities
20 and still remain within the exemptions of 11 C.F.R. §§ 100.94 and 100.155." *Explanation and*
21 *Justification for Internet Communications*, 71 Fed. Reg. 18605 (April 12, 2006). Thus, if
22 volunteers created and maintained www.kylewfoust.com, the reference to the website in the

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Foust Committee's letter did not constitute a contribution under the Act and therefore could not have resulted in the improper use of nonfederal funds for testing the waters activities.

As a result, the reference to the website and the use of the candidate's information contained therein is not a contribution to the Foust Committee. Accordingly, the Commission finds no reason to believe that Kyle Foust and the Foust Committee violated 11 C.F.R. §§ 100.72 and 100.131, or that Friends of Kyle Foust violated the Act.

B. Disclaimer

The letter sent by Kyle Foust and the Foust Committee contained a disclaimer at the bottom which read: "Paid for by the Kyle Foust Congressional Exploratory Committee, 5517 Zemville Drive ~ Erie, PA 16509." See Attachment 1 at 1. The disclaimer, however, was not enclosed in a printed box. In their response, Kyle Foust and the Foust Committee acknowledged that "the fundraising letter in question does not follow the letter of the law," but asserted that the letter complied with the "intent of the law."²

Under the Act, whenever a political committee makes a disbursement for the purpose of financing any communication through any mailing, or solicits any contribution through any mailing, such communication, if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee. See 2 U.S.C. § 441d(a). Among other requirements, disclaimers for printed communications must be contained in a printed box set apart from the other contents of the communication. See 2 U.S.C. § 441d(c)(2); 11 C.F.R. § 110.11(c)(2)(ii).

² Based on the response and the Foust Committee's reported expenditure of \$2,761.37 for this mailing, we infer that the letter was a mass mailing as defined in 11 C.F.R. § 100.27. It was, therefore, a public communication subject to the disclaimer requirements of the Act and Commission regulations. See 11 C.F.R. §§ 100.26; 110.11(a)(1).

1 Because the letter lacked a printed box around the disclaimer, the Foust Committee
2 appears to have violated 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii). However, due
3 to the *de minimis* nature of the violation, the Commission exercises its prosecutorial discretion
4 and dismisses the allegation that Foust for Congress (f/k/a Kyle Foust Congressional Exploratory
5 Committee) and Randall Rinke, in his official capacity as treasurer, violated 2 U.S.C. §
6 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii), and admonishes Foust for Congress (f/k/a Kyle
7 Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as
8 treasurer.

9 **C. IRS Notice Requirement**

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11 The complaint alleges that Kyle Foust and the Foust Committee violated 26 U.S.C.
12 § 6113 by failing to include a notice on the letter informing contributors that contributions are
13 not tax deductible. The Commission does not have jurisdiction to enforce this section of Title
14 26. See 2 U.S.C. § 437c(b)(1); *see also*, 26 U.S.C. § 7801(a)(1) (“[e]xcept as otherwise
15 expressly provided by law, the . . . enforcement of [Title 26] shall be performed by or under the
16 supervision of the Secretary of the Treasury”). Accordingly, the Commission dismisses this
17 allegation.

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